Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ROCKIE RATCLIFF, et al.,

Petitioners,

v.

CAPITAL CITIES/ABC, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a worker's status as an employee or independent contractor under ERISA may be determined exclusively by agreement between the worker and the employer such that a court may refuse to examine the remaining factors of the common-law test of agency articulated in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

LIST OF PARTIES

This action involves the consolidated district court Civil Action Nos. 94-2488GTV and 95-2212GTV. In Case No. 94-2488GTV, the plaintiffs which are collectively known as the "Star" include: Capital Cities/ABC, Inc., Kansas City Star Company, The Capital Cities Publishing Pension Plan, Ronald J. Doerfler, David J. Vondrak, Warren Salerno, in their capacity as Administrative Committee of the Capital Cities Publishing Pension Plan, and as Employee Benefits Committee of The Capital Cities ABC, Inc. Savings & Investment Plan, The Capital Cities/ABC, Inc. Savings & Investment Plan, The Kansas City Star Company Group Insurance Plan, Robert C. Woodworth, Wesley R. Turner, James L. Payne, Dell Campbell, Arthur S. Brisbane, Ralph W. Rowe, R. Richard Hood, Clark M. Lambert, H. Kent Simocosky, Peggy Ginther Rush, in their capacity as the Kansas City Star Company's Benefits Committee, The Kansas City Star Spending Account Program. The defendants in Case No. 94-2488GTV who are collectively known as the "Carriers" include: Rockie Ratcliff, Ernie Arnote and Paul Wooten.

In Case No. 95-2212GTV, the Carrier Plaintiffs include: Robert G. Hutsell, David E. Newman, Gordon S. Wright, Gilbert L. Mitchell, Bradley L. McElhaney, Michael K. Shepherd, Michael Shumacher, Janet Irwin, Cato Sims, Jr., Ronald D. Wright, Teresa A. Todd, Roger Gatschet, Kevin B. Clark, Paul Vincent, Rockie Ratcliff, Linda Inglehart, Ralph Smith, Ruth V. Cornett, Harvey A.

LIST OF PARTIES – Continued

Stephens, David Kirkpatrick, John C. Fox, Ernie Arnote, Pat Caskey, Roger W. Dean, Tom Hoover, Donald Miesner, Tom Palmer, Michael Piedmonte, Craig A. Robinson, Paul Trull, Paul Wooten.

The Star Defendants in Case No. 95-2212GTV include: The Kansas City Star Company, Capital Cities Media, Inc., Capital Cities/ABC, Inc., Capital Cities Publishing Pension Plan, Capital Cities/ABC, Inc. Savings and Investment Plan, The Kansas City Star Company Employee Group Insurance Plan, and The Kansas City Star Company Spending Account Program.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Rockie Ratcliff, et al., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 141 F.3d 1405 (10th Cir. 1998) (App. A). The opinion of the district court is reported at 953 F.Supp. 1228 (D. Kan. 1997) (App. B).

JURISDICTION

The court of appeals entered its judgment on April 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502 of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(1)(B), provides in pertinent part that, "A civil action may be brought by a participant . . . to recover benefits due to him under the terms of his plan . . . " Section 3 of ERISA defines "participant" as any "employee or former employee of an employer" and it in turn defines

"employee" as "any individual employed by an employer". 29 U.S.C. §§ 1002(6) and (7).

STATEMENT OF THE CASE

The Respondents consist of a class of over 1,600 present and former newspaper carriers or delivery agents (the "Carriers") who have delivered newspapers for the Kansas City Star Company (the "Star") since approximately 1978. Under the Star's Delivery Agent system, each Carrier was required to sign a standardized Agency Agreement which provided, among other things, that the Carrier was an independent contractor and that the Carrier would not be entitled to receive any benefits provided by the Star to its regular employees. Each Agency Agreement contained the following recitations:

> The Agent is and will continue to be a self-employed independent contractor and not an employee or servant of The Star. . . .
>
> It is expressly understood and agreed between the parties that The Agent will not be treated as an employee for federal, state, or local tax purposes. . . .
>
> It is further expressly understood that, as an independent contractor, The Agent will not receive, and has no claim to, any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees.

Around approximately 1991 to 1993, the IRS conducted a full-scale audit of the Star's Delivery Agent system to determine whether the Carriers were in fact

common-law employees of the Star rather than independent contractors as labeled in the Agency Agreements. On January 25, 1993, the IRS issued its Technical Advice Memorandum which concluded that all of the Carriers were common-law employees of the Star. Shortly thereafter, the IRS audited the individual income tax returns of numerous Carriers and required them to file their returns as if they were employees of the Star.

In the fall of 1994, the Carriers submitted claims for benefits under four ERISA plans maintained by the Star on the basis that they constituted common-law employees of the Star. Immediately after the Carriers' claims for ERISA benefits were denied by the Star's ERISA benefits claims committees in November of 1994, the Star (consisting of the Kansas City Star Company, its parent Company Capital Cities/ABC, Inc., and the Star's four ERISA plans and ERISA plans claims committees) filed a declaratory judgment class action against three representative Carriers in the United States District Court for the District of Kansas. In that action, the Star sought a declaratory judgment from the district court that the decisions reached by the claims committees were correct and that the Carriers were not entitled to ERISA benefits. Within two days of the filing of the Star's declaratory judgment action, a separate plaintiffs' class action was instituted by 31 representative Carriers against the Star, its parent company and the four ERISA plans in the United States District Court for the Western District of Missouri seeking, among other things, ERISA benefits pursuant to 29 U.S.C. § 1132. The Carriers' action was transferred to the District of Kansas, where it was consolidated with the Star's declaratory judgment suit.

The district court granted summary judgment in favor of the Star, and held that the Carriers were not entitled to ERISA benefits on two grounds: (1) the Carriers had signed Agency Agreements with the Star in which they agreed that they constituted independent contractors and they would not be entitled to benefits; and (2) that the Carriers were not intended to be covered by the terms of the Star's four ERISA plans. The district court's decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

The decisions of the district court and the Tenth Circuit were based almost exclusively on a 1991 decision of the Tenth Circuit: *Boren v. Southwestern Bell Tel. Co., Inc.*, 933 F.2d 891 (10th Cir. 1991). The courts below determined that the Carriers were not entitled to submit claims for ERISA benefits because, under *Boren*, the Agency Agreements constituted bilateral contracts which defined the relationship of the parties. The district court and the court of appeals concluded that it was unnecessary to look beyond the language of the Agency Agreements or to conduct a common-law agency analysis. Similarly, the decision of the court of appeals that the Carriers were not covered by the terms of the Star's four ERISA plans was tied to the court's conclusion that the execution of the Agency Agreements evidenced an overall intent that the Carriers should be excluded from those plans.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Decision is in Conflict With The Supreme Court's Decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

In *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) ("*Darden*"), this Court held that traditional agency criteria should be used to determine whether a worker qualifies as an "employee" for ERISA purposes. This Court noted that ERISA's definition of "employee" as "any individual employed by an employer" is "completely circular and explains nothing." 503 U.S. at 323. Accordingly, this Court adopted the common-law test of agency for determining who constitutes an employee under ERISA.

The common-law analysis requires that a court evaluate all factors relevant to the hiring party's right to control the manner and means by which the product is accomplished, including:

(a) the skill required in the particular occupation;

(b) the source of the instrumentalities and tools for the person doing the work;

(c) the location of the work;

(d) the duration of the work relationship;

(e) the hiring party's right to assign additional projects to the hired party;

(f) the hired party's discretion over when and how long to work;

(g) the method of payment, whether by the time or by the job;

(h) the hired party's role in hiring and paying assistants;

(i) whether the work is a part of the regular business of the hiring party;

(j) whether the hiring party is or is not in business;

(k) the provision of employee benefits;

(l) the tax treatment of the hired party.

503 U.S. at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)). This Court emphasized that the common-law test requires that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this case, in determining whether the Carriers constituted common-law employees under ERISA, the district court and the court of appeals refused to analyze or consider the necessary factors of the common-law test of agency. Rather, the courts below based their decisions exclusively on the fact that all of the Carriers had signed Agency Agreements which labeled them as independent contractors and which stated that they would not be entitled to receive employee benefits from the Star. The decisions of the district court and the court of appeals were predicated entirely on a pre-*Darden* Tenth Circuit decision: *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891 (10th Cir. 1991). In *Boren*, the plaintiff similarly claimed that he was entitled to ERISA benefits on the basis that he constituted a common-law employee of Southwestern Bell. The Tenth Circuit rejected the plaintiff's claim for

pension benefits because he had entered into a series of contracts with Southwestern Bell, each of which designated him as an independent contractor "for any purpose." The Tenth Circuit held that "the service contracts define the relationship of Mr. Boren and Southwestern Bell and determined their rights *inter se*." 933 F.2d at 894.

In this case, the Carriers argued to both the district court and the Tenth Circuit that *Boren* has been overruled by *Darden* to the extent that *Boren* is still urged for the proposition that a contract between a worker and his employer conclusively establishes whether that worker is an employee for ERISA purposes. The Carriers argued that based on this Court's ruling in *Darden*, although the intent of the parties should certainly be examined in applying the common-law test of agency, it cannot constitute the only factor. Throughout the entire administrative claims process and the legal proceedings below, the Carriers presented voluminous documentary and affidavit evidence pertaining to the factors identified in *Darden*. This evidence demonstrated that despite the Star's labeling of the Carriers as independent contractors, the Star extensively directed and controlled the daily work activities of the Carriers. In granting the Star's Motion For Summary Judgment, none of this evidence was even considered by the district court. In its opinion, the Tenth Circuit considered *Boren* to be dispositive and, therefore, considered the Carriers' evidence to be "actually irrelevant to the narrow issue in this case – namely, whether the Carriers voluntarily agreed that they would receive no benefits under the Plans." 141 F.3d at 1410. The Tenth Circuit did not believe that *Boren* was in any way affected by this Court's decision in *Darden* and stated: " . . . *Boren*

remains the law in this circuit, and, under *Boren*, contracts like the Agency Agreements may 'define the relationship of [the Carriers] and [the Star] and determine their rights *inter se*.' " *Id.*

The Tenth Circuit's decision, therefore, is in clear conflict with this Court's admonition in *Darden* that the common-law test of agency requires that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 503 U.S. at 324. The fact that the worker in *Darden* had not signed an agreement similar to the Agency Agreements signed by the Carriers does not change the common-law agency analysis. Numerous courts, both pre- and post-*Darden*, have established that the intent of the parties is only one factor to be considered in employing the common-law rules of agency. This Court in *Ward v. Atlantic Coastline R. Co.*, 362 U.S. 396 (1960), held that in determining whether an individual was an employee within the meaning of the Federal Employer's Liability Act that "the party's characterization is but one factor to be considered among others" under the common-law test of agency. 362 U.S. at 400. Similarly, in *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987), a pre-*Darden* case, the D.C. Circuit held that the common-law rules of agency must be applied to determine employee status for ERISA purposes. In *Holt*, the worker had signed an agreement which characterized her as an independent contractor rather than an employee. The court correctly noted, however, that:

> The simple fact that [the agreement] characterized appellant as a contractor did not make her one in the eyes of the law. Rather, the right of one party to control not only the result to be

> achieved by the other, but also the means and manner of performing the task assigned, is the most critical factor in ascertaining whether an employment relationship exists. Consequently, while all relevant circumstances are to be examined and evaluated, the degree to which English, appellant's supervisor, controlled her daily work activities is the primary consideration in determining her employment status.

811 F.2d at 1539. In applying all of the common-law factors, the Court in *Holt* determined that the worker constituted an employee for ERISA purposes, notwithstanding her agreement which designated her as an independent contractor.

II. The Tenth Circuit's Decision That The Carriers Are Not Entitled to ERISA Benefits Based on Their Agreements Which Designate Them as Independent Contractors is in Conflict With The Decisions of Several Other Circuits, Including Most Notably The Ninth and Eleventh Circuits.

The Tenth Circuit's statement that *Boren* remains viable even after this Court's decision in *Darden* has now created a severe and irreconcilable division among the various circuits. The Tenth Circuit's holding in this case that a contract between a worker and an employer may conclusively define the worker's status for ERISA purposes is directly at odds with the decisions rendered by several other circuits after *Darden*, most notably the Eleventh and Ninth Circuits.

For instance, the Tenth Circuit's decision in this case cannot possibly be squared with the Eleventh Circuit's

decision in *Daugherty v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993). In *Daugherty*, the Eleventh Circuit reversed the district court's entry of summary judgment which had determined that a former employee was an independent contractor rather than an employee for ERISA purposes. Just as in the present case, the employer required the worker to sign a consultant agreement which designated the worker as an independent contractor. The wording of the consultant agreement was similar to the language in the Agency Agreements signed by the Carriers in this case.[1] On appeal, the Eleventh Circuit rejected Honeywell's argument that the former employee was precluded from entitlement to any ERISA benefits by virtue of the consultant agreement. The Eleventh Circuit correctly noted that based on this Court's ruling in *Darden*, the characterization of the hired party as an independent contractor or employee is only one of several factors to be examined in order to determine employee status under ERISA. The court stated that, "the employment status of an individual for the purposes of ERISA is not determined by the label used in the contract between the parties." 3 F.3d at 1492. After applying all of the common-law factors, the Eleventh Circuit found that the worker

---

[1] The consultant agreement prepared by Honeywell provided as follows: "the CONSULTANT is an independent contractor and shall be free to exercise discretion and independent judgment as to the method and means of performance of the services in connection with the assignments made hereunder by HONEYWELL. The CONSULTANT is not an employee of HONEYWELL and shall not, by virtue of this Agreement, be entitled to any benefits or privileges provided by HONEYWELL to its employees."

was in reality an employee of Honeywell and therefore entitled to participate in the company's ERISA plans.

Similarly, the Tenth Circuit's decision is in conflict with the Ninth Circuit's recent decision in *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 899, 139 L.Ed.2d 884 (1998). In *Microsoft*, the Ninth Circuit held that a class of freelancers were entitled to ERISA benefits despite their agreements with the company which provided that they were independent contractors and that they were responsible for their own benefits. The Ninth Circuit found that these agreements were not enforceable against the freelancers because they were the product of a mutual mistake. The Ninth Circuit reasoned that since the workers and the employer were mistaken about their true employment relationship, the agreements were not binding and should not prevent the workers from receiving ERISA benefits. 120 F.3d at 1011-13.

The Tenth Circuit's decision appears to be at odds with recent decisions of the First and Seventh Circuits, as well. In *Dykes v. Depuy, Inc.*, 140 F.3d 31 (1st Cir. 1998) and *Trombetta v. Cragin Fed. Bank Ownership Plan*, 102 F.2d 1435 (7th Cir. 1996), the workers submitted claims for ERISA benefits on the basis that they constituted common-law employees of their companies. In both *Dykes* and *Trombetta* the workers signed agreements which labeled them as independent contractors. Despite the existence of these agreements, however, both the First and Seventh Circuits in these cases engaged in a complete analysis of all of the common-law factors of agency as instructed by this Court in *Darden*. After applying all of these factors, the courts found that under the facts of those cases the workers did

not constitute common-law employees. However, the courts in *Dykes* and *Trombetta* did not consider the agreements to be determinative of the relationship between the workers and their employers as the Tenth Circuit has held in this case. The analysis performed by the First and Seventh Circuits was correct because the courts considered all of the factors of common-law agency, rather than only the agreements signed by the workers.

III. The Question Presented is Urgent And Important.

In enacting ERISA in 1974, Congress declared that the continued well-being and security of millions of employees and their dependents were directly affected by the rapid and substantial growth of employee benefit plans and that benefit plans had become an important factor affecting the stability of employment and the successful development of industrial relations. 29 U.S.C. § 1001(a). As this Court has noted, "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62 (1980). The Tenth Circuit has also correctly recognized the important purposes served by ERISA and that "ERISA's broad mandate is to protect employees." *Roth v. American Hospital Supply Corp.*, 965 F.2d 862, 868 (10th Cir. 1992).

The fundamental purposes for which ERISA was enacted by Congress will be easily frustrated and avoided if employers are permitted to simply label workers as

independent contractors when, in all reality, they constitute employees. Even prior to this Court's decision in *Darden*, numerous circuits have expressed concerns that employers might attempt to circumvent the protections afforded by ERISA through adhesionary contracts forced upon their employees. *See, e.g., Holt v. Winpisinger, supra* at 1541 ("To allow employees to contract away ERISA's vesting provisions would frustrate the purpose of the statute which was enacted to protect employees from just such unfair deprivations of pension benefits."); *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984) (Congress did not intend abrogation of ERISA's standards by contract); *Spirides v. Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979) ("Employment contracts, no matter what the circumstances that justify their execution or what the terms, may not be used to waive protections granted to an individual under [Title VII of the Civil Rights Act of 1964] or any other Act of Congress".)

As competition and the costs of conducting business continue to escalate, employers are increasingly tempted to denominate their workers as independent contractors so as to avoid the costs of providing employee benefits. Since this Court's decision in *Darden* in 1992, there are dozens of reported decisions on the issue as to whether an individual constitutes an employee or independent contractor for ERISA purposes. The vast majority of these cases involve agreements signed by the workers which designate them as independent contractors. To assure uniformity in the protections provided by ERISA, the federal courts are in need of firm direction from this Court that employers will not be able to circumvent

ERISA simply by requiring their workers to sign agreements which label them as independent contractors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CAPITAL CITIES/ABC, INC.; Kansas City Star Company; the Capital Cities Publishing Pension Plan; Ronald J. Doerfler, David J. Vondrak, Warren Salerno, in their capacity as Administrative Committee of the Capital Cities Publishing Pension Plan, and as Employee Benefits Committee of the Capital Cities/ABC, Inc. Savings & Investment Plan; the Capital Cities/ABC, Inc. Savings & Investment Plan; the Kansas City Star Company Group Insurance Plan; Robert C. Woodworth, Wesley R. Turner, James L. Payne, Dell Campbell, Arthur S. Brisbane, Ralph W. Rowe, R. Richard Good, Clark M. Lambert, H. Kent Simocosky, Peggy Ginther Rush, in their capacity as the Kansas City Star Company's Benefits Committee; The Kansas City Star Spending Account Program; Plaintiffs – Appellees,

v.

ROCKIE RATCLIFF, Ernie Arnote, and Paul Wooten, Defendants – Appellants,

Robert G. HUTSELL, David E. Newman, Gordon S. Wright, Gilbert L. Mitchell, Bradley L. McElhaney, Michael K. Shepherd, Michael Shumacher, Janet Irwin, Cato Sims, Jr., Ronald D. Wright, Teresa A. Todd, Roger Gatschet, Kevin B. Clark, Paul Vincent, Rockie Ratcliff, Linda Inglehart, Ralph Smith, Ruth V. Cornett, Harvey A. Stephens, David Kirkpatrick, John C. Fox, Ernie Arnote, Pat Caskey, Roger W. Dean, Tom Hoover, Donald Miesner, Tom Palmer, Michael Piedmonte, Craig A. Robinson, Paul Trull, Paul Wooten, Plaintiffs-Appellants,

v.

The KANSAS CITY STAR COMPANY; Capital Cities Media, Inc.; Capital Cities/ABC, Inc.; Capital Cities Publishing Pension Plan; Capital Cities//ABC, Inc. Savings and Investment Plan; the Kansas City Star Company Employee Group Insurance Plan, and the Kansas City Star Company Spending Account Program, Defendants-Appellees.

No. 97-3031.

United States Court of Appeals,
Tenth Circuit.

April 17, 1998.

Robert J. Bjerg, Seigfreid, Bingham, Levy, Selzer & Gee, P.C., Kansas City, MO (Rachel H. Baker, Seigfreid, Bingham, Levy, Selzer & Gee, P.C., Kansas City, MO; R. Frederick Walters and J. Brett Milbourn, Walters, Bender & Strohbehn, P.C., Kansas City, MO, with him on briefs) for Appellants.

Michael S. Horne, Covington & Burling, Washington, DC (Joseph R. Colantuono, Overland Park, KS; Jeffrey B. Coopersmith, Covington & Burling, Washington, DC, with him on brief) for Appellees.

Before ANDERSON, BALDOCK, and MURPHY, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

These consolidated appeals arise under the Employment Retirement Income Security Act of 1974, 29 U.S.C.

§§ 1001-1461 ("ERISA"), and involve two groups of parties: those collectively known as "the Star" (Capital Cities/ABC, Inc., The Kansas City Star Company, the Star's four ERISA Plans and the ERISA Plans' claims committees, which had filed a declaratory judgment action against three newspaper carriers/delivery agents for the newspaper, the *Kansas City Star*); and those collectively known as "the Carriers" (thirty-one *Kansas City Star* newspaper carriers/delivery agents, representing a class of such carriers, who had filed an action against the Star). The Carriers' action was transferred to the District of Kansas, where it was consolidated with the Star's declaratory judgment action. The district court granted summary judgment to the Star. At issue is whether the Carriers are eligible to receive benefits under the Star's four ERISA plans. We affirm the district court's conclusion that they are not.[1]

BACKGROUND

Certain basic facts are undisputed. The Kansas City Star Company publishes the *Kansas City Star* newspaper. Until March 1990, it also published the *Kansas City Times*. The Star is a wholly-owned subsidiary of Capital Cities/ABC, Inc. The Carriers represent a class certified by the district court and consisting of "[a]ll persons who have been home delivery or single copy agents for the Kansas City Star Company pursuant to agency agreement since the delivery agent system was implemented by The Star

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[1] The Carriers have filed a motion for leave to file a supplemental joint appendix, which we grant.

in or about 1978." *Capital Cities/ABC, Inc. v. Ratcliff*, 953 F.Supp. 1228, 1230-31 (D.Kan.1997).

The Star offers to certain of its employees four separate ERISA plans: two employee pension plans and two employee welfare benefit plans. The pension plans are the Capital Cities/ABC, Inc. Savings & Investment Plan (the "Savings Plan") and the Capital Cities Publishing Pension Plan (the "Pension Plan"). The employee welfare benefit plans are the Kansas City Star Company Group Insurance Plan (the "Group Insurance Plan") and the Kansas City Star Spending Account Program (the "Spending Account Program"). A single committee comprised of Capital Cities officers and directors serves as the administrator of both the Savings Plan and the Pension Plan. A single committee comprised of Star officers and directors administers the coverage of the Group Insurance Plans and the Spending Account Program.

From 1880 until 1977, the Star's newspapers were delivered by independent newspaper carriers who bought papers from the Star at a wholesale rate and then resold them at a retail rate to customers. There is no dispute that those carriers were independent contractors with complete control over the delivery of papers. In September 1977, shortly after Capital Cities acquired the Star, the Star notified its carriers that it planned to change its newspaper delivery system. It terminated all existing contracts with its carriers, and replaced them with "Agency Agreements" pursuant to which the carriers became delivery agents. These Agency Agreements, which are critical to this case, provide in pertinent part as follows:

> The Agent is and will continue to be a self-employed independent contractor and not an employee or servant of The Star. . . .
>
> It is expressly understood and agreed between the parties that The Agent will not be treated by The Star as an employee for federal, state, or local tax purposes. . . .
>
> It is further expressly understood that, as an independent contractor, The Agent will not receive, and has no claim to, any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees. The Agent's compensation under this Agreement shall consist, in its entirety, of the fees set forth in paragraph 8 below.

Appellants' J.A. Vol. 1 at 135-37. Paragraph 8 in turn provided for a series of fees to be paid by the Star to the delivery agent, including a delivery fee for each newspaper delivered, a delivery service incentive fee, a collection incentive fee, and a solicitation incentive fee.

In 1991, the Internal Revenue Service began examining the Star's delivery agent system, and a subsequent audit resulted in the IRS's issuance of a Technical Advice Memorandum which concluded that many of the Carriers were common law employees of the Star.[2] A group of the Carriers then formally requested ERISA benefits under the Star's four ERISA plans. The Plans' claims committees eventually issued decisions denying the Carriers' claims for benefits under the four Plans.

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[2] This determination has, apparently, been retracted by the IRS.

The Star then filed its declaratory judgment action against three of the Carriers and the class they represent, seeking the following declaratory relief: that the Carriers were bound by their Agency Agreements which stated they would receive no benefits under the Plans; that the Carriers were not employees under the Plans; that the Carriers were estopped from pursuing claims for benefits; and that the decisions of the claims committees denying benefits should be upheld. The Carriers followed with their own class action suit, which was consolidated with the Star's action for declaratory relief.

The Star filed a motion for partial summary judgment, arguing that the Carriers were not eligible for benefits under the terms of the Plans and that the Carriers were bound by their Agency Agreements which provided that they were independent contractors and would not be entitled to any employee benefits. The Carriers also filed a motion for partial summary judgment, arguing that they were common law employees of the Star. The court granted the Star's motion for summary judgment and this appeal followed.

DISCUSSION

We review de novo the judgment of the district court granting summary judgment, applying the same standard as did the district court. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir.1996). Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We, as usual, construe the facts and all reasonable inferences therefrom in the

light most favorable to the part opposing summary judgment. *Chiles*, 95 F.3d at 1510.

A court must review the decision denying benefits under an ERISA plan de novo "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80 (1989); *see also McGraw v. The Prudential Ins. Co.*, 137 F.3d 1253, 1258 (10th Cir.1998). Finding no language in the Plans conferring discretionary authority on the administrators to determine entitlement to benefits, the district court applied a de novo standard. The parties agree that the same de novo standard applies on appeal.

The district court held that the Plans' committees correctly denied benefits to the Carriers on two bases: the Agency Agreements foreclosed their right to benefits and the terms of the four Plans evinced an intent to exclude the Carriers. We agree with the district court on both grounds.

I. Agency Agreements

Relying on *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891 (10th Cir.1991), the district court held that:

> [T]he Carriers contractually agreed prior to commencing employment with The Star that they would not be entitled to benefits. The Agency Agreements define the relationship of the parties. The Carriers are not entitled to benefits because the promise of benefits was a unilateral offer which they expressly rejected under

> the terms of the Agency Agreements. The court concludes that the Plan Committees properly denied benefits to the Carriers on the basis that the Carriers had signed Agency Agreements foreclosing their right to benefits.

Capital Cities, 953 F.Supp. at 1235 (footnote omitted). The Carriers argue the district court erred because (1) *Boren* has been implicitly overruled by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992); and (2) even if *Boren* remains good law, summary judgment was improper because there are numerous disputed factual issues relating to the validity and enforceability of the Agreements. We reject these arguments.

In *Boren*, the plaintiff entered into a series of contracts with Southwestern Bell, each of which designated him as an independent contractor "for any purpose." We observed that "[u]nder the common law, the promise of a pension is a unilateral offer which an employee accepts by performing the work governed by his employment contract." *Boren*, 933 F.2d at 894. We rejected the plaintiff's claim to pension benefits, stating:

> [T]he express terms of Mr. Boren's service contracts, in which he agreed that he was not considered an employee "for any purpose," prevent him from claiming that the work he performed for Southwestern Bell constituted an acceptance of the company's unilateral offer of pension benefits. Clearly, neither party intended Mr. Boren's work to constitute such an acceptance.

Id. We thus held that "the service contracts define the relationship of Mr. Boren and Southwestern Bell and

determine their rights inter se." *Id. Boren* has not been overruled, either implicitly or explicitly, by *Darden*.

In *Darden*, the Supreme Court simply held that, since Congress had failed to provide a satisfactory or helpful definition of "employee" in ERISA, where there was ambiguity about whether someone seeking benefits was an employee or not, the common law definition would apply. The opinion does not say that any person meeting the common law definition of employee is entitled to ERISA benefits. Thus, it by no means indicates that the Carriers, should they prove they meet the test for common law employees, would automatically be entitled to participate in the Plans. Indeed, it is well established that employers may exclude categories of employees from their ERISA plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *Bronk v. Mountain States Tel. & Tel., Inc.*, 140 F.3d 1335 (10th Cir.1998). Employers need not include every employee who meets the common law definition of employee. *See Hockett v. Sun Co.*, 109 F.3d 1515, 1525-27 (10th Cir.1997).[3]

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[3] We agree with the Star that our decision in *Roth v. American Hosp. Supply Corp.*, 965 F.2d 862 (10th Cir.1992), did not treat *Boren* as overruled by *Darden*. In *Roth*, the question was whether Mr. Roth was entitled to benefits under one company's plan when he had contractually agreed to be treated solely as an employee of another company. We examined the *Darden* common law employee factors to determine whether he had standing under ERISA as an employee of the company from whom he sought benefits. We concluded that he did not and we recognized the validity of his contract specifically "waiv[ing] his right to [the company's] benefit plans by refusing to become its employee." *Id.* at 867.

Furthermore, *Boren* remains the law in this circuit, and, under *Boren*, contracts like the Agency Agreements may "define the relationship of [the Carriers] and [the Star] and determine their rights inter se." *Boren*, 933 F.2d at 894. Under the Agency Agreements, the Carriers and the Star mutually agreed that the Carriers would not be treated as employees, would not receive "any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees," Appellants' J.A. Vol. 1 at 136-37, and would receive as compensation only the fees set forth in the Agreements. Thus, it is clear under the Agreements – bilateral contracts entered into at the commencement of the working relationship – that the Carriers were not entitled to benefits under the Star's ERISA plans.

The Carriers argue further, however, that, even if the Agency Agreements would otherwise foreclose the Carriers' argument that they are entitled to benefits, summary judgment was improper because they have presented evidence of material disputed facts as to the voluntariness of the Agreements. In particular, the Carriers submitted 38 affidavits which they argue show a

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Similarly, our decision in *Hockett v. Sun Co.*, 109 F.3d 1515 (10th Cir.1997), is not inconsistent with *Boren* or our decision in this case. In *Hockett*, a former employee signed a professional services agreement with his former employer, in which the former employee was designated as an independent contractor. We applied the *Darden* factors to determine whether he was in fact an employee or an independent contractor, and concluded he was an independent contractor. The agreement in *Hockett* did not, however, contain the statement that is critical to this case – namely, the explicit agreement not to receive benefits.

factual dispute over whether the Carriers were coerced by the Star into signing the Agreements and whether the Agreements were the product of honest arms-length bargaining. We reject this argument for two reasons.

First, we agree with the district court and the Star that there is no issue here of the waiver of an existing right to receive benefits. Because the Agency Agreements were signed prior to the commencement of the Carriers' work, they were simply executory contracts containing an agreement that, inter alia, the Carriers would receive no benefits. Thus, the question of the voluntariness of a waiver of existing rights is irrelevant.

Second, assuming the Carriers have a valid argument on whether they were coerced into signing the Agreements, they have not established the existence of a disputed issue of material fact. The affidavits in question assert that the Agreements were presented to the Carriers on a "take-it-or-leave-it" basis, that the Carriers had no opportunity or ability to negotiate the terms of the Agreements, and that they were given little time to review the Agreements before signing them. Taking all of that as true, we are not convinced that there is a disputed issue of fact *material* to this case.

The relevant issue, under *Boren*, is whether the Agreements constitute a mutual understanding that the Carriers would not receive benefits under the Star's Plans. The Carriers had, for many years, been independent contractors who unquestionably had no claim to eligibility for benefits. Thus, the Agreements represented no change from the Carriers' prior status. The Agreements, which the Carriers signed each year, apparently

without complaint, perpetuated that relationship, and there is no indication that the Carriers were unaware of their status vis-a-vis the Star's Plans. The Carriers present no evidence that they attempted to change or challenge the Agreements in that respect, or that they ever expressed dissatisfaction with their compensation package, including their non-participation in the Plans. And the fact of the matter is, while the Carriers complain that the Agreements were presented to them on a "take-it-or-leave-it" basis, they were free to not "take it" and the Star could hire people who would.

In sum, while the Carriers' affidavits contain many statements suggesting that the Star did not in fact treat them as independent contractors, that is actually irrelevant to the narrow question at issue in this case – namely, whether the Carriers voluntarily agreed that they would receive no benefits under the Plans. General statements that they were not offered the chance to negotiate the terms of the Agreements, or even that they were given little time to review them, do not convince us that there is a genuine factual dispute about whether the Carriers were aware of or agreed to the continuation of the identical status they had for many years previously as non-participants in any employee benefits plans maintained by the Star.[4] We therefore affirm the district court's

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[4] The Carriers also argue that the Star committed fraud in connection with the Agency Agreements because it kept secret from the Carriers the fact that the IRS had sent a notice to the Star indicating that it believed one of the Delivery Agents was a common law employee for federal income tax purposes. One of the pieces of evidence upon which the Carriers rely to support this argument is a confidential memorandum addressed to

conclusion that summary judgment was properly granted to the Star on the ground that the Agency Agreements foreclosed the Carriers' right to benefits.

II. The Terms of the Plans

While our conclusion that the Agency Agreements foreclose the Carriers' assertion of entitlement to benefits and fully support the district court's grant of summary judgment to the Star, we alternatively affirm the district court's conclusion that the terms of the Plans exclude the Carriers. As all parties agree, the Supreme Court has directed us to interpret an ERISA plan like any contract, by examining its language and determining the intent of the parties to the contract. *See Firestone Tire & Rubber Co.*, 489 U.S. at 112-13, 109 S.Ct. at 955-56; *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir.1996). If we determine that the plan language is ambiguous, we may look at extrinsic evidence. We note, however, that if the extrinsic evidence to which we resort is conflicting, summary judgment is inappropriate. *Id.* at 1515. There are four Plans involved in this case. We address each in turn.

The Savings Plan includes "any staff or talent employee of the Company who is remunerated in U.S. currency, but shall not include . . . an individual who is

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"ALL CIRCULATION DIVISION PERSONNEL." Appellants' J.A. Vol. 2 at 574. In this memorandum, however, it is clear that the Carriers were aware of the IRS' inquiries, and it contains the statement that "[s]ome [of the Carriers] feel that they have been found to be employees." *Id.* Thus, it hardly seems that the Carriers were unaware of the IRS' concerns about their status.

hired by the Company pursuant to an employment agreement or personal services agreement if such agreement provides that such individual shall not be eligible to participate in the Plan." Appellants' J.A. Vol. 1 at 174-75. The district court did not specifically state whether it viewed the Agency Agreements as employment agreements or personal services agreements, but nonetheless held that they qualified as agreements excluding the Carriers from participation. The Star argues they are personal services agreements, an argument which the Carriers forcefully reject, and the parties spar on the issue of whether they are "employment agreements" under the Plan. The Carriers argue that such an interpretation concedes the Star's whole case – if we hold they are employment agreements, we have conceded that the Carriers are employees and therefore eligible to participate in the Plan. The Star responds that that is not necessarily so; even if the Carriers are "employees" that does not automatically mean they are Plan participants, since ERISA plans may permissibly exclude certain employees.

Like the district court, we decline to determine which precise type of agreement the Agency Agreements were because we conclude, from the language of the Savings Plan, that the clear intent of the Plan was to exclude from participation those with whom the Star had contractually agreed not to provide benefits. The Agency Agreements contain just that agreement. Thus, we affirm the district court's conclusion that the Savings Plan clearly excluded the Carriers, as parties with whom the Star had entered into agreements specifically stating they would not be eligible to participate in the Plan.

The Pension Plan defines a "participant" as "an Employee who is eligible to be and becomes a Participant in accordance with the provisions of Section 2.1." Appellants' J.A. Vol.1 at 188. Section 2.1 in turn defines eligibility by reference to an individual's "Employment Commencement Date," which is defined as "the first day for which an individual is credited with an Hour of Service." *Id.* at 186, 189. As the Star argues, nothing involving the Carriers' relationship with the Star, whether compensation or work duties, contemplates "hours of service." While we agree with the Carriers that, standing alone, the definition of employee as "any individual . . . . in the service of [the Star]," is quite broad, when the Pension Plan is construed as a whole, it is clear that it did not contemplate individuals like the Carriers when it defined and described its participants.[5]

The remaining two Plans, the Insurance Plan and Spending Account Program, provide little specific guidance as to who is eligible to participate, other than general statements about "eligible employees." The use of the term "eligible" suggests that some sub-group of all

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[5] The Carriers argue that the Star's argument concerning the "employment commencement date" is not properly before us because "it was not part of the basis for the claims committees' denial of benefits decisions nor was it relied upon by the district court in its decision granting summary judgment." Appellants' Reply Br. at 17 n.2. We reject this argument. We have stated many times that "[w]e are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Medina v. City & County of Denver*, 960 F.2d 1493, 1495 n. 1 (10th Cir.1992) (citations omitted).

employees would be participants; it therefore connotes some criteria for determining eligibility. Thus, as the Star argues, those two Plans cannot include "all common law employees" because the term "eligible" would thereby be superfluous. Additionally, under both Plans, payments for participation in the Plan are deducted from the participant's payroll check, and the Carriers do not dispute the Star's statement that the Carriers have never been on the Star's payroll.

Finally, in examining the language and intent of all four Plans, we cannot ignore the fact that the Carriers had signed the Agreements, which specifically provided that they would receive no benefits. It defies common sense to think that the Star would simultaneously enter into explicit agreements, signed anew each year or at least every two years, *excluding* the Carriers from participation in the Plans, while maintaining and administering Plans which *include* the Carriers. While the Carriers argue that we should not look at such "extrinsic" evidence on summary judgment, we are entitled to do so to the extent the Plans' terms are ambiguous. We see no reason not to look at it, given that the terms of the Agreements are undisputed, and we have rejected the Carriers somewhat belated argument that there are disputed factual issues relating to the validity or enforceability of the Agreements.[6]

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[6] The Carriers argue that the Star's treatment of one delivery agent amounts to conflicting extrinsic evidence rendering summary judgment improper. The Carriers assert that Floyd Weisner is a long-time delivery agent whom the Star treats as an employee and who receives ERISA benefits. The Star asserts that Mr. Weisner's situation has not been identical to that

For the foregoing reasons, we AFFIRM the judgment of the district court.

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of the Carriers, in that he was employed both as a "hawker" employee, for which he was issued a W-2 form, as well as a delivery agent under an Agency Agreement, for which he was not issued a W-2. Even assuming that Mr. Weisner's situation was as described by the Carriers, that does not indicate that the Star's Plans were written to include all delivery agents/carriers, nor does it create such conflicting evidence as to make summary judgment improper.

APPENDIX B

CAPITAL CITIES/ABC, INC.,
et al., Plaintiffs,

v.

Rockie RATCLIFF, et al., Defendants.

Robert HUTSELL, et al., Plaintiffs,

v.

The KANSAS CITY STAR COMPANY,
et al., Defendants.

Civil Action Nos. 94-2488-GTV, 95-2212-GTV.

United States District Court,
D. Kansas.

Jan. 24, 1997.

Joseph R. Colantuono, Polsinelli, White, Vardeman & Shalton, Overland Park, KS, Michael S. Horne, John M. Vine, Covington & Burling, Washington, DC, for plaintiffs in No. 94-2488.

Robert J. Bjerg, Lynne C. Kaiser, Rachel H. Baker, Seigfreid, Bingham, Levy, Selzer & Gee, Kansas City, MO, J. Brett Milbourn, R. Frederick Walters, Walters, Bender & Strohbehn, Kansas City, MO, for defendants in No. 94-2488.

Robert J. Bjerg, Lynne C. Kaiser, Rachel H. Baker, Seigfreid, Bingham, Levy, Selzer & Gee, Kansas City, MO, J. Brett Milbourn, R. Frederick Walters, Walters, Bender & Strohbehn, Kansas City, MO, for plaintiffs in No. 95-2212.

Joseph R. Colantuono, Cathy J. Dean, Polsinelli, White, Vardeman & Shalton, Overland Park, KS, Michael

S. Horne, John M. Vine, Jeffrey B. Coopersmith, Covington & Burling, Washington, DC, for defendants in No. 95-2212.

MEMORANDUM AND ORDER

VAN BEBBER, Chief Judge.

These are consolidated cases involving the question of whether current and former newspaper carriers of *The Kansas City Star* and *The Kansas City Times* are entitled to employee benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The court will review the procedural posture of the consolidated cases to assist in the understanding of the motions now pending before the court.

On November 30, 1994, Capital Cities/ABC, Inc., The Kansas City Star Co., the Star's four ERISA plans and the plans' claims committees (collectively referred to as "The Star") filed a declaratory judgment action in this court, *Capital Cities/ABC, Inc., et al. v. Ratcliff*, Case No. 94-2488-GTV, and named three newspaper carriers as defendants. In that action, The Star sought a judgment declaring that the members of the defendant class of newspaper carriers are bound by their contractual commitment that they have no rights to benefits under the four ERISA plans (Count I); the term "employees" as used in the four ERISA plans does not include the defendant class (Count II); the defendant class is estopped from pursuing claims for benefits under the four ERISA plans (Count III); and the decisions of the four claims committees to deny benefits should be upheld (Count IV).

On December 2, 1994, thirty-one *Kansas City Star* newspaper carriers ("the Carriers") filed an action against the Kansas City Star Company, its ownership corporations, the four ERISA plans and the claims committees in the United States District Court for the Western District of Missouri. *Hutsell, et al. v. The Kansas City Star, et al.*, our Case No. 95-2212-GTV. On May 4, 1995, Judge Joseph E. Stevens, Jr. of the Western District of Missouri transferred the *Hutsell* action to the District of Kansas, where it was subsequently consolidated with the Ratcliff action pending before this court.

In the *Hutsell* action, the Carriers seek benefits and other relief under both ERISA and several state law claims. Specifically, the Carriers' ERISA claims include: a claim for benefits pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (Count I); breach of fiduciary duty and removal of the administrators of the Plans pursuant to § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2) (Count II); and a claim for injunctive relief pursuant to § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (Count III).

The Carriers' state law causes of action include: breach of contract (Count IV); fraudulent misrepresentation (Count V); negligent misrepresentation (Count VI); illegal deductions from wages pursuant to the Kansas Wage Payment Act, K.S.A. § 44-319 (Count VII); illegal non-payment of overtime compensation pursuant to the Kansas Minimum Wage and Maximum Hour Law, K.S.A. § 44-1201 *et seq.* (Count VIII); illegal non-payment of overtime compensation pursuant to the Missouri Minimum Wage Law, Mo.Stat.Ann. § 290.500 *et seq.* (Count IX); and breach of contract for employee fringe benefits (Count X).

In an order dated September 20, 1996, the court formally certified a defendant class of Carriers defined as:

> All persons who have been home delivery or single copy agents for the Kansas City Star Company pursuant to agency agreement since the delivery agent system was implemented by The Star in or about 1978.

The court further ordered that The Star give notice of these pending suits to all potential class members.

I. PENDING MOTIONS

The consolidated cases are now before the court on The Star's motion for summary judgment in both actions (Doc. 73), and the Carriers' motions to strike the declarations of Dermot R. Hayes (Doc. 82) and F. David Lake, Jr. (Doc. 83).

The court has reviewed the briefing of the parties regarding the preceding motions and is now prepared to rule.[1] For the reasons set forth below, the motion to strike the declaration of Hayes is granted in part and denied in part, the motion to strike the declaration of Lake is denied as moot, and the Star's motion for summary judgment is granted.

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[1] The Carriers have requested oral argument on the motion for summary judgment (Doc. 91). Because the court finds that oral argument will not be of material assistance in the resolution of the motion, the request is denied. D.Kan.R. 7.2.

II. FACTUAL BACKGROUND[2]

The Kansas City Star Company publishes *The Kansas City Star*. Until March 1990, it also published *The Kansas City Times*, a separate morning newspaper. The Kansas City Star Company is a wholly owned subsidiary of Capital Cities/ABC, Inc.

As part of its compensation package, The Star offers to certain of its employees two employee pensions plans and two employee welfare benefit plans, as those terms are defined under ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and § 3(1), 29 U.S.C. § 1002(1). These plans are: The Capital Cities/ABC, Inc. Savings & Investment Plan ("the Savings Plan"); The Capital Cities Publishing Pension Plan ("the Pension Plan"); The Kansas City Star Company Group Insurance Plan ("the Insurance Plan"); and The Kansas City Star Spending Account Program ("the Spending Account Program"). A single benefits committee serves as the plan administrator for the Savings Plan and the Pension Plan. A separate single benefits committee serves as the plan administrator for the Insurance Plan and the Spending Account Program. These committees will be referred to as the "Plan Committees."

The Carriers are individuals who currently or formerly delivered *The Kansas City Star* and/or *The Kansas City Times*. Each carrier entered into an Agency Agreement with The Star. The Agency Agreements provide that:

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[2] The court will consider the following facts as uncontroverted in accordance with Fed.R.Civ.P. 56 and D.Kan.R. 56.1 for the purposes of The Star's summary judgment motion.

> The Agent is and will continue to be a self-employed independent contractor and not an employee or servant of The Star. . . .
>
> It is expressly understood and agreed between the parties that The Agent will not be treated as an employee for federal, state, or local tax purposes. . . .
>
> It is further expressly understood that, as an independent contractor, the Agent will not receive, and has no claim to, any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees. The Agent's compensation under this Agreement shall consist, in its entirety, of the fees set forth in paragraph 8 below.

Paragraph 8 of the Agency Agreement provides for a series of fees, including a delivery fee of a specified amount for each paper delivered, a delivery service incentive fee, and a collection incentive fee.

In September 1994, twenty-three Carriers made a formal request for benefits to the Plan Committees for themselves and all carriers similarly situated. On November 30, 1994, the Plan Committees denied the benefit claims in identical decisions. The Committees gave three bases for their decisions. First, they held that each of the newspaper carriers expressly agreed in an Agency Agreement that the carrier would not receive, and had no claim to, any benefits under The Star's benefit plans. Second, the Committees held that the newspaper carriers do not qualify as "employees" under the Plans. Finally, the Committees held that the newspaper carriers fall outside the common law definition of "employee" and therefore are

not entitled to participate in the benefit plans under ERISA.

III. STANDING

The court must determine whether the parties have standing to pursue their actions prior to addressing the substance of the motions pending before it. The Star has brought the *Ratcliff* action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a determination that current and former newspaper carriers are not eligible for employee benefits created and governed under ERISA. The Carriers have brought claims in Counts I through III of the *Hutsell* action seeking benefits to which they are allegedly entitled under ERISA.

An individual claiming benefits under an ERISA plan must be either a "participant" or a "beneficiary." 29 U.S.C. § 1132(a)(1). ERISA defines "participant" as:

> any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). Because the definition of employee under ERISA is circular, the United States Supreme Court has adopted the common law agency test for determining whether an individual is an employee. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 1348,

117 L.Ed.2d 581 (1992). ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

The Carriers' standing to bring suit under ERISA must be based upon their status as employees of The Star who are or may become eligible for benefits under The Star's ERISA plans. The Tenth Circuit has held that the determination of whether an individual is an employee is a question of fact. *Roth v. American Hosp. Supply Corp.*, 965 F.2d 862, 865 (10th Cir.1992).

The Carriers and The Star disagree as to whether the Carriers are employees or independent contractors. The Carriers urge the court to address the issue of their employment status prior to reaching the two other bases for the Plan Committees' decisions. The Carriers, in fact, maintain that prior to ruling on the substantive issues which The Star raises in its motion for summary judgment in the *Hutsell* action, the court must determine whether the Carriers are employees under the common law test articulated in *Darden*. The Carriers insist that because they are employees under the common law test, they are entitled to benefits under the Plans.

The determination of whether the Carriers have standing to bring the *Hutsell* action depends on a resolution of the question which they contend is the crux of their action – whether or not they have a colorable claim to vested benefits as employees of The Star. *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1129 (5th Cir.1996). It is not possible for the court to determine standing without commencing a highly factual inquiry into the question of

whether the Carriers are employees under the common law test articulated in *Darden*.

Instead, the court finds that in the interest of judicial economy, it should consider whether the *Ratcliff* declaratory judgment action brought by The Star can resolve the issues at hand. ERISA does not specifically permit fiduciaries such as the Plan Committees in the *Ratcliff* action to file a declaratory judgment action seeking interpretation of their plans. *Prudential Ins. Co. of Amer. v. Doe*, 76 F.3d 206, 210 (8th Cir.1996). The court does have jurisdiction, however, under the Declaratory Judgment Act, 28 U.S.C. § 2201, to determine whether the Plan Committees' decisions should be upheld. *Id.* Accordingly, the court will proceed to address the issues raised in the current pending motions.

IV. MOTIONS TO STRIKE

The Carriers have filed motions to strike the declarations of Dermot R. Hayes and F. David Lake, Jr. These declarations were filed in support of The Star's motion for summary judgment.

A declaration made under penalty of perjury may be submitted in lieu of an affidavit. 28 U.S.C. § 1746(2). Declarations, however, are subject to the same requirements as affidavits submitted under Rule 56(e). *See* Fed.R.Civ.P. 56 and D.Kan.R. 56.1.

The Carriers contend that the court should strike portions of the Hayes declaration because (1) paragraphs three, four, and six contain material and information outside the administrative record; (2) Hayes fails to identify

the origin and accuracy of Exhibit B to the declaration; and (3) Hayes fails to state that Exhibits F and G are true and accurate summaries of the Insurance Plan and the Spending Account Program.

Upon review of the declaration and Exhibits in question, the court concludes that The Star has not established that the information in paragraphs three, four, and six were before the Plan Committees during the administrative proceedings. Thus, the court will grant the motion to strike as to these paragraphs. In addition, the court will not consider Exhibit B because Hayes has failed to identify its origin or swear to its accuracy. Finally, the court denies the Carriers' request to strike Exhibits F and G of the Hayes declaration. In paragraph seven, Hayes clearly identifies Exhibits F and G as "true and correct copies of relevant portions of . . . (c) the Kansas City Star Employee Group Insurance Plan (Exh. F); [and] (d) the Capital Cities/ABC Spending Account Program (Exh. G)."

The Carriers also seek an order striking the Lake declaration. The Lake declaration addresses certain tax matters which may have a bearing on the Carriers' status as either employees or independent contractors of The Star. As discussed below, the court need not address this issue in deciding the motion for summary judgment. Accordingly, the Carriers' motion to strike the Lake declaration is denied as moot.

V. SUMMARY JUDGMENT

In deciding a motion for summary judgment, the court must examine any evidence tending to show triable issues in the light most favorable to the nonmoving party.

Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir.1984). A moving party is entitled to summary judgment only if the evidence indicates "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine factual issue is one that "can reasonably be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by "showing" that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2514. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.*

In the present motion, The Star seeks summary judgment on its claims in the *Ratcliff* action (Counts I-IV) and partial summary judgment on the Carriers' claims in the *Hutsell* action (Counts I-III). The court first will consider the motion with respect to the *Ratcliff* action because a favorable ruling on behalf of The Star will obviate the need to address the claims in the *Hutsell* suit.

The Star contends that it is entitled to a judgment upholding the decisions of the Plan Committees on two of the three bases given for the decision. Specifically, The Star contends that (1) the court should enforce the Agency Agreements which clearly and unequivocally provide that the Carriers are not employees of The Star and are not entitled to employee benefits, and (2) the Carriers are not eligible for benefits under the terms of the four ERISA Plans. The Star contends that the court can decide the issue of the Carriers' eligibility for ERISA benefits on either of these two bases and it need not address the third basis for the Plan Committees decisions – whether the Carriers are employees of The Star under the common law agency test.

A. Standard of Review

The court must review the denial of benefits under an ERISA plan de novo, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989). If the plan gives the administrators discretionary authority, then the "decision must be upheld unless it was arbitrary and capricious, not supported by the substantial evidence or erroneous on a question of law." *Thorpe v. Retirement Plan Of Pillsbury Co.*, 80 F.3d 439, 442-43 (10th Cir.1996) (citations omitted). Although The Star urges the court to apply the arbitrary and capricious standard to the Plan Committees' denial of benefits to the Carriers, it does not point to any specific language in its four ERISA Plans that vests discretionary authority in the administrators. The

court, therefore, will apply a de novo standard of review to the Committee decisions.

B. The Plan Committees Decisions

The Plan Committees articulated three rationale for their denial of benefits to the Carriers. The court will limit its discussion to the first two bases: (1) that the Carriers are not entitled to benefits due to the Agency Agreements; and (2) that the Carriers are not eligible employees under the terms of the Plans.

1. The Agency Agreements

The first basis upon which the Plan Committees predicated their denial of benefits to the Carriers was the fact that the Carriers had entered into Agency Agreements with The Star specifically providing that they are independent contractors and not entitled to benefits. The Star contends that summary judgment should be granted on this issue because it is undisputed that all Carriers signed such agreements and the agreements are binding upon them.

The Carriers urge the court to ignore the provisions of the Agency Agreements and to award them benefits because they meet the definition of "employee" under the common law test articulated by the Supreme Court in *Darden*, 503 U.S. 318, 112 S.Ct. 1344. The court, however, is not convinced that the outcome turns on the issue of whether the Carriers are independent contractors or employees of The Star.

There is nothing in ERISA mandating that an employer must cover all its employees under a benefit plan; an employer is free to discriminate against and exclude particular classes as long as certain statutory minimum participation requirements are met. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896-97, 77 L.Ed.2d 490 (1983).[3] Accordingly, even if the court assumes that the Carriers are employees of The Star, this does not automatically qualify them for benefits under the Plans.

In *Boren v. Southwestern Bell Tel. Co., Inc.*, 933 F.2d 891 (10th Cir.1991), the Tenth Circuit addressed an argument substantially similar to the one currently advanced by the Carriers. In that case, Boren entered into a series of one-year contracts with Southwestern Bell to provide architectural supervision services. The contracts specifically declared that Boren was an independent contractor and that he was not to be considered an employee "for any purposes." *Id.* at 892. Boren alleged that he was entitled to benefits under the company's pension plan regardless of the contractual agreement because he was an "employee" as defined in the plan.

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[3] *Shaw* makes clear that employers are free to exclude certain classes of employees with respect to both pension and welfare benefit plans. ERISA's minimum participation requirements, however, apply only to pension plans; welfare benefit plans are totally exempt from such requirements. *Crouch v. McKan Iron Workers Welfare Fund*, 740 F.2d 805, 808-09 (10th Cir.1984). The Star's pension plans are in full compliance with the ERISA requirements. *See Abraham*, 85 F.3d at 1130-31 (discussing the minimum participation requirements).

In holding that Boren was not entitled to benefits, the court explained that:

> [u]nder the common law, the promise of a pension is a unilateral offer which an employee accepts by performing the work governed by his employment contract. However, the express terms of Mr. Boren's service contracts, in which he agreed that he was not considered an employee "for any purpose," prevent him from claiming that the work he performed for Southwestern Bell constituted an acceptance of the company's unilateral offer of pension benefits.

Id. at 894 (citations omitted). Because the court found that the service contracts defined the relationship of the parties, it declined to address Boren's argument that he was an employee under the common law test.

The Carriers contend that *Boren* has no precedential value because the Supreme Court effectively overruled the case in *Darden*, 503 U.S. 318, 112 S.Ct. 1344. The court disagrees. In *Darden*, an insurance company's former agent brought suit against the company to recover ERISA benefits. The agent had signed an agreement which purported to forfeit his entitlement to plan benefits if, within one year of leaving the company's employment, he sold insurance for any competitor within twenty-five miles of his prior business location. When the agent allegedly violated the agreement, the company disqualified him from receiving benefits. The agent then sued claiming the benefits were nonforfeitable because they had already vested.

The fundamental issue in *Darden* was whether the agent had standing to seek his benefits under ERISA. As

noted above, only plan "participants" may enforce the substantive provisions of ERISA. A participant is defined as an employee or former employee of an employer. 29 U.S.C. § 1002(7). Reversing the lower court's expectation-based test, the Supreme Court held that the term "employee," for purposes of ERISA, incorporates the "traditional agency law criteria for identifying master-servant relationships." *Darden*, 503 U.S. at 319, 112 S.Ct. at 1346.

The Carriers now argue that *Darden* stands for the proposition that courts, prior to assessing a claimant's contractual right to benefits, must make an initial determination whether the claimant is an employee under the common law test. The Carriers, therefore, suggest that *Boren's* threshold contractual assessments of benefit entitlement are no longer valid. The Carriers read *Darden* too broadly.

It appears that the Carriers have confused the issue of standing with the issue of whether parties can contractually define entitlement to ERISA benefits. Here, as in *Boren*, the Carriers contractually agreed prior to commencing employment with The Star that they would not be entitled to benefits. The Agency Agreements define the relationship of the parties. The Carriers are not entitled to benefits because the promise of benefits was a unilateral offer which they expressly rejected under the terms of the Agency Agreements.[4] The court concludes

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[4] The Carriers argue that the court must consider whether they knowingly and voluntarily waived the right to benefits under the Agency Agreements. *See Lanick v. Advisory Committee of the Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1363 (2d

that the Plan Committees properly denied benefits to the Carriers on the basis that the Carriers had signed Agency Agreements foreclosing their right to benefits.

2. *Terms of the Plans*

The Plan Committees also denied the Carriers benefits on the grounds that the terms of The Star's ERISA Plans excluded the Carriers from benefit eligibility. The Carriers are not entitled to benefits unless they are "eligible" employees under each of the plans, regardless of whether they meet the common law agency test for "employee" status. *See Roth*, 965 F.2d at 867-68 (common law agency factors are irrelevant where individual has waived his right to employer's benefit plans); *see also Trombetta v. Cragin Fed. Bank*, 102 F.3d 1435, 1439-40 (7th Cir.1996) (nothing in ERISA compels employee benefit plans to use the term "employee" in the same way it is used in the statute). The court finds that all of The Star's plans demonstrate an intent to exclude the Carriers from coverage.

The four ERISA plans at issue define eligible employees in the following ways: (1) the Savings Plan excludes from the definition of employee "an individual who is hired by the Company pursuant to an employment agreement or a personal services agreement if such

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Cir.1991). Waiver is the intentional relinquishment of a known right. Here, the Carriers did not waive the right to benefits because that right never accrued. The present case is distinguishable from *Lanick* because in that case, the employee signed the waiver of benefits a few days after he began employment.

agreement provides that such individual shall not be eligible to participate in the Plan"; (2) the Pension Plan defines a participant as "an Employee who is eligible to be and becomes a participant"; (3) the Insurance Plan provides benefits to full-time or part-time employees who elect to participate in the Insurance Plan; and (4) the Spending Account Program provides benefits to eligible employees who elect to participate.

The Carriers clearly are excluded from entitlement to benefits under the language contained in the Pension Plan. The Carriers have signed agreements which provide that they are not eligible to participate in the plan. Further, although the language of the remaining three plans is not as specific, the use of the term "eligible employee" in those plans indicates an intent to exclude certain workers from participation. In that light, the court cannot divorce its interpretation of the ERISA plans from the unequivocal terms of the Agency Agreements. *See Boren*, 933 F.2d at 894 (regardless of terms in company's ERISA plans, plaintiff is bound by his service contract in which he agreed that he would not be considered an employee for any purpose); *see also Roth*, 965 F.2d at 867 (common law agency factors for determining employment status are irrelevant where plaintiff has waived his right to benefits).

In an attempt to circumvent the proscriptive language of The Star's plans, the Carriers, citing *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir.1996), argue that their denominated status as "independent contractors" in the Agency Agreements does not control their entitlement to benefits. The court disagrees. In *Vizcaino*, a group of "temporary" employees, who had signed instruments

labelling themselves as independent contractors but whom Microsoft later conceded to be common law employees, sued Microsoft for improperly excluding them from coverage under the company's savings and stock option plans.

Microsoft's savings plan, the only plan at issue governed by ERISA, defined participants as all "common law employees" on the company's payroll. A divided Ninth Circuit panel held that Microsoft's "independent contractor" classifications warranted little deference and the plaintiffs' actual status as common law employees required that they be covered under both plans. *Vizcaino*, 97 F.3d at 1194-96. The majority premised its opinion on a finding that Microsoft did not intend to deny benefits from the plaintiffs themselves; Microsoft merely intended to preclude independent contractors from coverage. *Id.* at 1195. Indeed, the agreements that the plaintiffs entered into prior to commencing employment included no express waiver of benefits. The majority held that because Microsoft conceded that the plaintiffs were common law employees and not independent contractors, the company had no legitimate basis for rejecting the plaintiffs' benefit claims. *Id.* at 1196.

The Star's employee benefit plans in the instant action are clearly distinguishable from those at issue in *Vizcaino*. The Star's plans neither incorporate nor adopt the common law definition of an employee in delineating the scope of their coverage. To the contrary, The Star's plans impose eligibility requirements evincing an unequivocal intent to exclude the Carriers from participation. The *Vizcaino* majority, in fact, readily acknowledged that employers are free to draft employee benefit plans

discriminating against certain groups of workers. *Id.* The court finds that under the terms of the plans and the Agency Agreements, the Carriers are not eligible for any of the benefits provided under The Star's pension and welfare plans. Thus, the court concludes that the Plan Committees acted correctly in denying benefits to the Carriers under this alternative basis.

VI. CONCLUSION

The court concludes that summary judgment in favor of The Star is appropriate in the *Ratcliff* action. All members of the class of Carriers are bound by this order upholding the Plan Committees' decisions. In addition, the Carriers' ERISA claims, brought in Counts I through III in the *Hutsell* action, are foreclosed by the court's ruling that the decisions of the Plan Committees were correct.

Pursuant to 28 U.S.C. § 1367(c)(3), the court, in its discretion, declines to exercise supplemental jurisdiction over the state-law claims brought in Counts IV through X in the *Hutsell* action. Accordingly, both above-captioned cases are now closed.

IT IS, THEREFORE, BY THE COURT ORDERED that The Star's motion for summary judgment (Doc. 73) is granted.

IT IS FURTHER ORDERED that the Carriers' motion to strike the declaration Dermot R. Hayes (Doc. 82) is granted in part and denied in part.

IT IS FURTHER ORDERED that the Carriers' motion to strike the declaration of F. David Lake, Jr. (Doc. 83) is denied as moot.

The above-captioned cases are now closed.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.